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The Supreme Court of the United States in three decisions recently announced involving the extraterritorial validity of decrees of divorce made certain and of general application throughout the United States, some rules which heretofore have been uncertain and diversely applied in different jurisdictions. Bell v. Bell, on appeal from the New York Court of appeals; Atherton v. Atherton, on appeal from the same court, and Streitwolf v. Streitwolf, on appeal from the Court of Errors and Appeals of New Jersey. In the Bell case and the case from New Jersey the decisions of the State courts were affirmed, which held a judgment of divorce procured in another State upon substituted service of process void. In the Bell case the foreign divorce had been procured in Pennsylvania, and in the Streitwolf case in North Dakota.

In the Bell case, the wife, in the city of Buffalo, where she had always resided, sued her husband for divorce. The husband in answer pleaded a divorce decree granted by the court of common pleas of Jefferson county in the State of Pennsylvania. The wife had been served in the Pennsylvania suit by publication and by mail, according to the laws of that State, but she had not appeared, and judgment had been rendered against her by default. The referee in the wife's suit in New York decided that the wife had always been domiciled in the State of New York and that the husband was not a *bona fide* resident of the State of Pennsylvania. In the opinion of the Supreme Court of the United States, written by Mr. Justice Gray, the rule governing such cases is stated as follows: "Upon the record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other State." In this case, the Court of Appeals of New York was upheld in its refusal to give credit to the Pennsylvania divorce.

In the Atherton case, the Court of Appeals of New York had refused faith and credit to a decree of divorce obtained by a husband in Kentucky. The Supreme Court of the United States reversed this ruling and holds that the courts of New York must give full faith and credit to the Kentucky decree. It appeared that the husband had always been domiciled in Kentucky, and after the marriage of the parties in New York, they lived together as husband and wife in Kentucky. They separated, she taking their child. A provision was made for mother and child in a separation agreement, after which the mother returned to New York and became domiciled there. Thereafter a Kentucky court granted to the husband a divorce dissolving the marriage for the wife's desertion of him and she was served with the process of the Kentucky court by mail only. Subsequently the wife commenced an action for a limited divorce in New York, and it was held by the courts of that State that the Kentucky divorce was not a bar to the same (32 Hun, 179; 155 N. Y. 129), which judgments are now reversed by the federal court.

The Supreme Court of the United States seems by this decision to hold that, in cases in which husband and wife have separated, and their domiciles are in different States, the courts of either State have jurisdiction of the subject-matter, that is to say, of the matrimonial relation, and that the courts of either State can gain jurisdiction of the absent defendant by service of its process by mail or by publication or by personal service out of the State. The fact which is always open to investigation is the jurisdictional fact of the plaintiff's domicile in the State, the courts of which have granted the divorce. Upon that fact the jurisdiction of the subject-matter depends, and if in the divorce suit, or in any subsequent action in which the divorce decree is called into question, such domicile of the plaintiff can be disproved, the divorce decree will be avoided. This rule, if carried to its logical consequence, overthrows much of the divorce law of the State of New York, since it has here been consistently held that jurisdiction of the person of a citizen of New York State, resident here, could not be obtained by a foreign court unless he voluntarily appeared in the foreign tribunal or was served with its proc-

ess within the territorial limits of the foreign State. In law, the word foreign applied to State signifies any State other than the one in which the party is domiciled.

The *New York Law Journal*, in commenting upon the effect of this decision upon the divorce law of that State, has this to say: "Nevertheless the facts themselves as well as the dissenting opinion of Mr. Justice Peckham, make it apparent that the court went to great lengths in upholding the Kentucky divorce. There is no doubt of the general principle that a wife may acquire a separate domicile from her husband. We do not see why, under the present decision, that right of a wife is not to be upheld in conjunction with the right, when the parties are *bona fide* separately domiciled, of the spouse first beginning a proceeding for divorce at his or her domicile, to obtain a judgment of general validity upon substituted service of process. That was the situation and such was the decision in Ditson v. Ditson, 4 R. I. 87, which is cited in both the prevailing and dissenting opinions in Atherton v. Atherton, and the prevailing opinion also refers to the approval of the doctrines of Ditson v. Ditson in Cooley on Constitutional Limitations.

While Mr. Justice Gray does not independently expound general principles, he does summarize the law of the different States of the Union at great length, calling attention to the fact that the strict attitude of New York against the recognition of foreign divorces on substituted service is exceptional, or almost exceptional. It is true that the court remarks:

'This case does not involve the validity of a divorce granted on constructive service by the court of the State in which only one of the parties ever had a domicile, nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case the divorce in Kentucky was by the courts of the State which has always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.'

We do not, however, understand that it was intended by this language to lay stress upon the principle of a wife's domicile following that of her husband. As a matter of fact Kentucky was the only place in which the two parties actually had lived together as husband and wife. It is not necessary to attach any technical import to the phrase 'matrimonial domicile;' the term seems to have been used as one of fact and not of law. Nor, in our judgment, does the pointing out of the actual scope of the present decision imply that its doctrine would be limited to its facts. It is decided that a divorce granted under the circumstances of the present case by substituted service is valid elsewhere, and, as to the probability of extension rather than restriction of the policy, it is significant that the spirit of the references to Ditson v. Ditson, and similar cases, is not all one of dissent, but to say the least, one of most respectful consideration.

The fact is not to be overlooked that practically all the States of the Union—including our own—provide for the granting of divorces upon substituted service. The inconsistency of the New York position in refusing to recognize divorces similarly procured in sister States has been a subject of frequent comment. Considering the desirability of uniform matrimonial *status*, we have always inclined to the belief that when the Supreme Court of the United States came to interpret the full faith and credit clause, as applied to interstate divorce law, it would follow the principle laid down in Ditson v. Ditson, *supra*, and by the great weight of State court authority. It seems to us that the present decision is the first step toward such general interpretation."

NOTES OF IMPORTANT DECISIONS.

PROOF OF DEATH—PRESUMPTIONS.—In Ross v. Blount, 60 S. W. Rep. 894, decided by the Court of Civil Appeals of Texas, it was held that proof that plaintiff's ancestor moved to another State many years before, with intent to make that his residence, and that he had not been heard from since, is not sufficient to prove his death, and the consequent devolution of title on plaintiff, there being no evidence that search and inquiry had been made for him there, which resulted in failing to ascertain his whereabouts or whether he was alive. The court said in part:

"The judgment of the court below can be maintained upon the ground that the evidence of the plaintiff was not sufficient to entitle her to re-

cover. It is clear from the testimony, that she relies upon the fact that she was the sole surviving heir of her deceased father, Archibald Thompson, and it appears, from the special act of the legislature, that the grant was intended as a donation to Archibald Thompson or his heirs. Such being the case, there is nothing in the record tending to negative the proposition that the land in controversy was the separate property of Archibald Thompson. The evidence shows that he moved to California about 1855; and, other than the naked fact that the plaintiff had not heard from him since that time, there is nothing in the record tending to show that he is not still residing there and was alive at the time of the trial of this case. An absence of seven years may, under certain circumstances, raise the presumption that the absent one is dead; but that presumption, under the facts in this case, does not arise. If he went to California, and as the testimony shows that he intended to work there in the mines, that place became his residence, and in the absence of evidence tending to show that a search and inquiry was made for him there, which resulted in failing to ascertain his whereabouts or whether he is alive, it would not raise the presumption that he was dead. Before the plaintiff could recover, the burden was on her to establish the death of her father. This she has not done. Therefore the judgment of the court can be affirmed upon this ground."

MASTER AND SERVANT — CONTRACT OF EMPLOYMENT — DISCHARGE FOR CAUSE — ENTIRE CONTRACT — PART PERFORMANCE. — In Hildebrand v. American Fine Art Co., 85 N. W. Rep. 268, decided by the Supreme Court of Wisconsin, the following is from the syllabus by the judge writing the opinion:

"The rule that where an employee under an entire contract wrongfully terminates it he cannot recover thereon, or at all, for services rendered up to the time of such termination, does not apply to a case where such a contract has been terminated by the employer for cause. The rule generally in this country is that where a servant is prevented from performing his contract, either from sickness or death, or by reason of being discharged from the master's service, whether rightfully or wrongfully, he is entitled to recover for the services actually rendered, subject to the right of a recoupment in case of a rightful discharge, as hereafter stated. In an action against an employer, by an employee who has been discharged for cause, to recover for services rendered, the employer may recoup such damages as he is legally entitled to by reason of the facts which rendered such discharge justifiable. Though the general rule is that where a contract is entire the consideration moving from each party to the other is entire and the rights of the parties reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other, it admits of exceptions, and one of them is that it does not apply to a party failing to complete his contract, when prevented from so doing by the other party, regardless of the reason of such prevention. The circumstances of terminating an entire contract for labor bears on the right of one seeking compensation for part performance thereof as follows:

"(*a*) If one party withdraws by consent of the other, after part performance of such a contract, he can recover thereon at the contract rate for what he has done.

"(*b*) If a party to such a contract be wrongfully prevented by the other from rendering full performance, he can recover upon the contract for the services rendered prior to such prevention, and his damages for not being allowed to complete the contract, not exceeding the full amount he could have earned by such performance, such amount, *prima facie*, being full wages for the balance of the contract period, which may be reduced by proof that wages were or might reasonably have been earned during such time.

"(*c*) If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for services rendered up to the time of such prevention, subject, however, to such damages as the other party may recoup in the action for the former's misconduct.

"In an action to recover for part performance of a contract, of the party who has rightfully terminated the same, *prima facie*, the amount recoverable is the contract rate for services rendered up to the time of the discharge, and that will prevail in the absence of a claim for damages properly pleaded as a counterclaim and established on the trial.

"A person circumstanced as last above indicated must sue upon the contract or for damages, not upon a *quantum meruit*, though his recovery must be upon that basis, it being presumed that he earned and is entitled to the contract rate for the time his services continued, till the contrary is shown by evidence to sustain a properly pleaded counterclaim."

INSURANCE—PROVISIONS OF POLICY—FORECLOSURE OF MORTGAGE.— The Supreme Court of California, reversing the lower court, decides in Schroeder v. Imperial Ins. Co., 63 Pac. Rep. 1074, that where a fire policy provided that, unless otherwise indorsed thereon, it should become void, if, with the knowledge of the insured, foreclosure proceedings should be commenced against the property covered by the policy, the policy became void on the service of process in foreclosure, and failure to secure the insurer's consent to the increased risk, notwithstanding insured had no knowledge of the proceedings commenced until such service of process. The court says:

"A contract of insurance is to be interpreted by the same rules as are other contracts, and is

to be so interpreted as to give effect to the mutual intention of the parties; and this intention is to be deduced, if possible, from the language of the contract. Civ. Code, §§ 1635, 1636; Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Yoch v. Insurance Co., 111 Cal. 503, 44 Pac. Rep. 189, 34 L. R. A. 857. The above clause in the policy is included in that portion which enumerates many grounds for avoiding it, and it is manifest that the parties intended by these several clauses to agree that the defendant should not be liable upon the policy in case the risk that it assumed should be thereafter increased, unless its consent to such increased risk should be indorsed upon the policy. The provision above quoted is directed to the fact of knowledge on the part of the insured of the commencement of foreclosure proceedings, and not to the time at which he may obtain such knowledge, and the reasonable construction to be given to the clause is that whenever he shall have knowledge of the proceedings, and shall fail to obtain the consent of the insurer thereto, the policy shall be avoided. That the risk assumed at the date of the policy would be increased by foreclosure proceedings against the insured property was a fact well recognized in matters of insurance, and it has been held that a proviso in the policy that it shall be avoided by the commencement of foreclosure proceedings has that effect, even though the insured is ignorant thereof. Titus v. Insurance Co., 81 N. Y. 410; Meadows v. Insurance Co., 62 Iowa, 387, 17 N. W. Rep. 600. It was doubtless for the purpose of overcoming the harshness of this rule that the standard form of policy limits this effect to those proceedings of which the insured has knowledge. This limit is for the benefit of the insured, and that he may have an opportunity to obtain the consent of the insurer to the increased risk, and pays an additional premium therefor, if it shall be demanded. The object of the clause is to provide against an increase of the risk, but such increased risk would not be varied by the knowledge or ignorance of the insured, and it may be assumed that the parties deemed it just that the insured should have an opportunity to procure the consent of the insurer thereto, and therefore provided that the policy should not be forfeited if the proceedings were had without his knowledge.

"It would be a solecism to speak of the insured having 'knowledge' of proceedings yet to take place. He might be informed of the purpose of the mortgagee to commence proceedings, and he might have a belief that they would be commenced, but his information or belief could not be termed his 'knowledge' of their commencement. It is equally unreasonable to assume that the parties intended by this clause to limit the provision avoiding the policy to proceedings of which the insured has knowledge at the identical moment of their commencement. These views find support in Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. Rep. 31; Woodside Brewing Co. v. Pacific Fire Ins. Co., 11 App. Div. 68, 42 N. Y. Supp. 620; Gibson Electric Co. v. Liverpool, L. & G. Ins. Co., 10 App. Div. 225, 41 N. Y. Supp. 675, affirmed in 159 N. Y. 418, 54 N. E. Rep. 23; Norris v. Insurance Co., 55 S. Car. 450, 33 S. E. Rep. 566; Insurance Co. v. Brown, 77 Md. 79, 25 Atl. Rep. 992.

"A contrary construction was given by the Supreme Court of Idaho in Bellevue Roller Co. v. London & L. Fire Ins. Co., 39 Pac. Rep. 196, but the reasoning of the court thereon does not commend itself to our judgment. It urges in support of its conclusion that it would not be a reasonable construction of the clause to so construe it as to require a party to give notice of a fact of which he has no information or knowledge, but, as the clause makes no provision requiring any notice to be given to the insurer, the reason thus given is inapplicable. The policy merely provides that it shall be avoided, if the consent of the insurer is not obtained. The case in Idaho was cited in one of the district courts of appeals in Texas (Insurance Co. v. Freeman, 33 S. W. Rep. 1091), but the decision therein does not appear to have rested upon this authority. In another district court of the same State the clause seems to have received a different construction. Insurance Co. v. Clayton (Tex. Civ. App.), 43 S. W. Rep. 910."

DOES A MORTGAGEE UNDER DEED ABSOLUTE IN FORM GAIN RIGHTS NOT INCIDENT TO AN ORDINARY MORTGAGE?

A Controverted Question.—For centuries the mortgagee was regarded by the courts of common law as the actual owner of the mortgaged premises, and it was only by slow degrees that this view gave place to the more liberal doctrine of the courts of equity. It was not until the time of Lord Mansfield that the former courts began to recognize the mortgagor as owner against all the world, save the mortgagee. That great jurist in the case of Martin v. Mowlin[1] declared that a mortgage was a mere security giving the mortgagee but a chattel interest in the land; and although it was said afterwards by English courts that this case went too far, its doctrine was accepted by some of the most eminent American judges,[2] although not with its full logical effect. The mortgagee's right within certain limits to take

[1] 2 Burr. 970.

[2] By Chancellor Kent, see Jackson v. Willard, 4 Johns. 41; Waters v. Stewart, 1 Cal. Cas. 47; Hitchock v. Harrington, 6 Johns. 295. See also Sutherin v. Mandurn, 5 N. H. 420.

possession still continued. It was not until the enactment of statutes postponing ejectment until after foreclosure that a mortgage became in fact "a mere lien." Where these statutes were adopted, abandonment by the mortgagee of all claim to the premises, excepting as the holder of a lien thereon, might have been expected. But such has not been the case at least in several States. A controversy akin to that anciently waged between mortgagor and mortgagee has arisen with respect to a mortgage, which in form is an absolute deed, and not a few recent decisions encourage the mortgagee to reassert under this form of mortgage his old time common law rights.

How Far a Question of Statutory Construction.—The statutes of the several States relevant to the question under discussion vary somewhat in their language, yet the conflict in the decisions of the respective courts is not attributable in any appreciable degree to these variations. We find that courts of States having practically identical statutes have given contrary decisions upon the question. The New York statute reads as follows: "No action of ejectment shall hereafter be maintained by a mortgagee or his assigns or representatives for the recovery of the possession of the mortgaged premises."[3] That of Michigan is a reproduction of this with the addition of an unimportant clause.[4] Yet while the New York court declared the statute to apply to all mortgages, whether in the ordinary form or in the form of an absolute conveyance,[5] the Michigan court said: "When a deed absolute in form is given to secure a debt, the purpose generally is to vest in the grantee a larger power of disposition than he would have under an ordinary mortgage, and we are not prepared to say that the statute which forbids ejectment by the mortgagee before foreclosure was intended to reach a case of that description."[6] In a number of the States the statute is somewhat more explicit than the foregoing. Thus the California Practice Act, sec. 260, provides that: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale." Yet in Hughes v. Davis[7] it was held that a deed absolute in form gave the right of possession to the mortgagee, while the Washington[8] and Minnesota[9] courts came to the opposite conclusion, although the statutes[10] there are less emphatic than the California act, the clause "whatever its terms" being absent. In Iowa, where the statute provides that "in the absence of stipulations to the contrary the mortgagor of real property retains the legal title and right of possession,[11] the court held that a mortgage in the form of a deed conveyed the legal title,[12] and so under a similar statute in Nebraska,[13] while in Dakota under the same statute the contrary rule was laid down.[14] The Georgia statute provides that a mortgage must clearly indicate the creation of a lien,[15] and a deed which does not do this is held to pass the legal title.[16]

The Affirmative View—Alleged Peculiar Rights—Resulting Uncertainty.—As already intimated the courts of Michigan, Iowa, Nebraska and Georgia construe a deed intended as a mortgage as giving the mortgagee greater rights than an ordinary mortgage.[17] The same view is taken in Nevada[18] and Ohio.[19] A review of the cases, however, will show that the decisions in these States

[3] Stewart v. Hutchings, 13 Wend. 485, 2 Rev. St. 312, sec. 57.

[4] Laws of Mich. 1843, H. S. 7847, the clause added to the Michigan statute reads as follows: "Until the title thereto shall have become absolute upon the foreclosure of the mortgage."

[5] Stewart v. Hutchings, 13 Wend. 485; Swart v. Service, 21 Wend. 37.

[6] *Dictum* in Wetherbee v. Green, 22 Mich. 312, cited and approved in Bennett v. Robinson, 27 Mich. 26; Jeffery v. Hursh, 42 Mich. 563.

[7] 40 Cal. 117.

[8] Snyder v. Parker, 53 Pac. Rep. 59.

[9] Meighen v. King, 31 Minn. 115, 16 N. W. Rep. 702.

[10] 2 Hill's Ann. Code, 539, sec. 29, ch. 75, Gen. Stat. 1878.

[11] Rev. Code, 1888, sec. 1938.

[12] Haggerty v. Brower, 75 N. W. Rep. 321.

[13] Morton v. Covell, 10 Neb. 423, 6 N. W. Rep. 477.

[14] Shimerda v. Wohlford, 82 N. W. Rep. 393.

[15] Code, sec. 1955.

[16] Gibson v. Hough, 60 Ga. 588; West v. Bennett, 59 Ga. 507.

[17] See cases cited in notes 6, 12, 13, 16. Also Gallagher v. Giddings, 33 Neb. 222, 49 N. W. Rep. 1126; Burbick v. Wentworth, 42 Iowa, 440; Richards v. Crawford, 50 Iowa, 494. But compare Harrington v. Foley (Iowa), 79 N. W. Rep. 64.

[18] Brophy Mining Co. v. Brophy & Dale Mining Co., 15 Nev. 101. But see Pierce v. Traver, 13 Nev. 526.

[19] Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. Rep. 566; Baird v. Kirtland, 8 Ohio St. 21. See, too, The Nat. Bank of Columbus v. The Tenn. Coal. Co., 62 Ohio St. 564.

have been reached practically without discussion. Almost the only case in which the question has received the attention which its importance seems to merit is that of Jackson v. Lodge,[20] in which the California court was divided, Rhodes, J., writing a dissenting opinion, contending that the mortgagee gained the right of possession, and this opinion was afterwards followed in Hughes v. Davis.[21] But the latter case has been overruled, and the contrary doctrine is now well established in California.[22] The courts which recognize peculiar rights as attaching to a mortgage in the form of a deed have not yet, except in a few instances, had occasion to specify these alleged peculiar rights. The most important of their decisions in this connection are those which hold that the legal title and right of possession to the mortgaged premises passes to the mortgagee.[23] However, a few incidental rights have also been declared. Thus a case in Michigan seems to draw a distinction between the accountability for rents and profits of an ordinary mortgagee who takes possession by way of enforcing his security, and one who takes possession under deed absolute in form, intimating that the latter is liable for any failure to obtain full rental value for the premises in the degree only that an agent of the mortgagor thus put into possession would be liable.[24] No distinction in this respect is made in Nebraska.[25] But in that State when the mortgagor was allowed a specified time to redeem from a deed absolute in form, and his bill was dismissed because of failure to make payment within the time allowed, his right to redeem was barred, although a sale as in foreclosure would have been necessary to bar redemption in the case of an ordinary mortgage.[26] And several cases have held that the mortgagor's interest under such deed is not leased by parol.[27] It seems impossible that within the statute of frauds, and may be reincreased uncertainty respecting the law of mortgages should not result from these decisions in the jurisdictions where they have been rendered. If a mortgage in a particular form, but without any express stipulation, passes the legal title and right of possession, surely the less important rights may be expected to pass under the same form. Why should not the mortgagee with reason claim all the incidents of ownership which the common law originally recognized as pertaining to his estate? Through the long exerted influence of the courts of equity these incidents have almost everywhere been recognized as pertaining to the mortgagor's estate, and it is certainly a backward step to open a door for the reassertion by the mortgagee of claims denounced as inequitable upon every page in this department of the history of the law's development.[28]

Michigan Cases, Paradoxical—Action at Law—Parol Evidence.—As the cases in Michigan are not consistent with one another, a somewhat full examination of them is deemed advisable. On the one hand it has been held that a mortgage in the form of a

[20] 36 Cal. 28.

[21] 40 Cal. 117.

[22] Locke v. Moulton, 96 Cal. 21, 30 Pac. Rep. 937; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. Rep. 1020; Smith v. Smith, 80 Cal. 323, 21 Pac. Rep. 4; Murdoch v. Clark, 90 Cal. 427, 27 Pac. Rep. 275; Healy v. O'Brien, 66 Cal. 517.

[23] See cases cited in notes 6, 12, 13, 16, 17, 18, 19 and 21.

[24] Bernard v. Jennison, 27 Mich. 230.

[25] Morrow v. Jones, 41 Neb. 867, 60 N. W. Rep. 369; Comstock v. Michael, 17 Neb. 288, 22 N. W. Rep. 549; Kemp v. Small, 32 Neb. 318, 49 N. W. Rep. 169.

[26] Gallagher v. Giddings, 33 Neb. 222, 49 N. W. Rep. 1126.

[27] McMillan v. Jewett, 85 Ala. 476; Stall v. Jones, 66 N. W. Rep. 653. But see article in 51 Cent. L. J. 401 and cases cited.

[28] As indicating the scope of the controversy heretofore waged between mortgagor and mortgagee, reference may be had to the following decisions: That dower attached to the mortgagor's estate. Collins v. Torrey, 7 Johns. 278; Coles v. Coles, 15 Johns; 319; Hitchcock v. Harrington, 6 Johns. 290; Davis v. Darrow, 12 Wend. 67; Van Duyne v. Thayer, 14 Wend. 231; Mayberry v. Brien, 15 Pet. 21. In England dower was not recognized as an incident to the mortgagor's estate, but Lord Mansfield, in the case of Burgess v. Wheate, 1, Bl. Rep. 160, said: "It is not on law or reason but on practice that the wife is denied dower." Mortgagee's right to maintain action for waste.—No such right at least until after forfeiture (Peterson v. Clark, 15 Johns. 203), nor trover for trees cut by the mortgagor (*Id.*), nor even ejectment without previous notice to quit. Dickenson v. Jackson, 6 Cow. 147. Mortgagor may maintain trespass against the mortgagee even after condition is broken. Runyan v. Mesereau, 11 Johns. 538. That the interest of the mortgagee is not real estate, and will pass by parol or delivery of the evidence of the debt (Jackson v. Blodgett, 5 Cow. 202; Green v. Hart, 1 Johns. 580; Jackson v. Willard, 4 Johns. 41; Langdon v. Buel, 9 Wend. 80; Bank v. Bank, 9 Wend. 410; Wilson v. Troup, 2 Cow. 195; Smith v. Moore, 11 N. H. 55; Sutherin v. Mandurn, 5 N. H. 420); that payment of the debt would discharge the mortgage. Lane v. Shears, 1 Wend. 433. See also cases collected in note to Cook v. Cooper, 7 L. R. A. 273.

deed gives the mortgagee the right of possession without any stipulation whatever,[29] the implication being that the law implies that right as an incident to mortgages in that particular form. On the other hand it has been held that under the ordinary form the most express stipulation of the parties will not pass that right to the mortgagee.[30] Here is surely a remarkable paradox. A right that cannot be gained by deliberate agreement of the parties to a transaction may yet be gained without any agreement whatever for that purpose. If such be the law it is a clear case of preferring form to the evident intention of the parties, of importing into an instrument which confessedly does not express the real nature of the transaction, terms which would not be binding if set forth in an instrument which showed on its face the actual undertaking of the parties. No clearer case could well be imagined of legal encouragement to fraud and finesse. What the mortgagor in his mortgage cannot relinquish for the most adequate consideration may yet be cozened out of him by inducing him to give a deed by way of security. If he be willing to part with possession upon default, stipulation in the mortgage to that effect will not bind him; but if he desires to retain possession he may yet be ousted by a mortgagee who has taken a deed and given back a defeasance in parol only.[31]

Yet in Michigan the rule forbidding parol evidence to vary the terms of a written instrument does not exclude such evidence, even in an action at law, when the purpose is to show that the instrument was in fact intended as a mortgage. This modification of the rule was first announced in Fuller v. Parrish,[32] which was an action in trover. Hill v. Goodrich,[33] and Hyler v. Nolan[34] were actions in *assumpsit*. Seligman v. Ten Eyck[35] was an appeal from the disallowance of a claim in the probate court. In each of these cases parol evidence was admitted, and they certainly indicate that in Michigan the character of the proceeding as one at law or in equity is not important, so far as the admissibility of parol evidence to show that a deed was intended as a mortgage is concerned. These cases, however, had reference to chattel mortgages. The cases relating to real estate are more confused and require careful examination. Bennett v. Robinson[36] was an action in summary proceedings. Robinson was grantee of one Nichols who had taken a conveyance from Bennett by way of security but absolute in form. Robinson brought action for the possession, Bennett still claiming the right thereto and being in actual occupation of the premises. Parol evidence was introduced to show the true character of the deed to Nichols, and no question seems to have been raised as to its admissibility. The court held that although intended as security, the deed would pass the right of possession to Nichols and to his grantee, the implication being that the evidence by parol was competent. So in Wetherbee v. Green[37] we have a similar implication in an action of replevin for staves cut from timber growing upon land claimed by the plaintiff under deed intended as security although absolute in form. In Jeffery v. Hursh[38] it was held that the mortgagee was entitled to maintain ejectment by virtue of his deed. The opinion (which we quote below)[39] seems to assume that posses-

[29] See cases cited in note 6.

[30] Hazeltine v. Granger, 44 Mich. 503, cited in Union St. R. R. Co. v. City of Saginaw, 115 Mich. 300; Fifth Nat. Bank v. Pierce, 75 N. W. Rep. 1058. Compare, however, Mich. Trust Co. v. Lansing Lumber Co., 103 Mich. 392; Belding v. Meloche, 113 Mich. 223.

[31] Compare Hazeltine v. Granger, 44 Mich. 503; Ferris v. Wilcox, 51 Mich. 105.

[32] 3 Mich. 211.

[33] 39 Mich. 439.

[34] 45 Mich. 357.

[35] 74 Mich. 525.

[36] 27 Mich. 26.

[37] 22 Mich. 311.

[38] 42 Mich. 563.

[39] Graves, J.: The plaintiffs in error who are the sole heirs at law of John Jeffery, deceased, brought this action of ejectment to recover certain premises some years previously conveyed by the defendant, Elizabeth Hursh, to their father, the said John Jeffery. The defense was that the plaintiffs were not entitled to recover possession because the beforementioned grant from Mrs. Hursh to plaintiffs' father, although an absolute conveyance on its face, was in fact only a mortgage; and there are no questions presented which are independent of the validity of this defense. The points agitated relate to the right to defend against the ejectment on this ground, and to the character of the evidence adducible to prove the fact. That the grant in question was apparently an absolute conveyance is admitted, and is certain; and it is equally certain that no written defeasance is shown. The bond of John M. Hursh, husband and attorney in fact of the grantor, does not purport to be a defeasance. Parol evidence would be necessary to stamp the arrangement as a mortgage transaction. The plaintiffs requested an instruction that they were entitled to a verdict. But this was refused and the circuit judge left it to the jury to

sion followed as an actual substantive right, not merely that the deed purported *prima facie* to give that right, and that this could not be disputed by parol evidence. The learned judge who wrote the opinion, however, does not seem to have kept clearly in mind the distinction between a substantive right and a mere rule of evidence for the passages that we have placed in italics suggest that he assumed that the defendants had a remedy in equity to defeat the plaintiffs' claim to possession, and that the only reason they could not do this in ejectment was because of the inadmissibility of parol evidence in that form of action. And this is evidently the construction given the decision by the circuit judge, for on a subsequent trial of the same case he excluded the parol evidence. This time the supreme court declared very clearly that it was error to exclude the parol evidence. A new fact, however, had been introduced on the second trial. It appeared that the deed had been executed under power of attorney "to sell and convey," and was, therefore, void if in fact intended as a mortgage, as a power to sell gave no power to mortgage.[40] This new fact may have changed the nature of the defense which the parol evidence supported, and the court apparently assumed that it did. In the first trial the defense was that the plaintiff had no right to possession, *because the deed under which he claimed was really a mortgage*, but in the second trial the defense was that the plaintiff had no right of possession, *because the deed under which he claimed was absolutely void*. The first, it may be argued, was an equitable, the second a legal defense. The rule that an equitable defense will not be permitted in ejectment has been declared again and again in Michigan,[41] and if we assume that the judgment in the first trial was reversed, because an equitable defense was allowed, and that in the second, because a legal defense was excluded, the two opinions in the case can be harmonized. But the necessary conclusion is that whether the evidence offered in support of the equitable defense be verbal or written is a matter of no consequence, as neither are admissible. The bar is not primarily against parol evidence, it is the equitable defense that is forbidden.

But now let us turn to Ferris v. Wilcox,[42] decided just one year after the last opinion in Jeffrey v. Hursh was written. This was also ejectment by the grantee in a deed which he claimed was absolute in fact as well as in form. He had, however, given a contract for the sale of the land to the grantors providing for a re-entry in case of their default in making payments, but stipulating for possession by them until such default. Default having occurred the grantee brought ejectment, claiming that the relationship between him and defendants was that of vendor and vendee. The trial court took the same view and gave judgment in his favor. But the supreme court construed the land contract to be a mere defeasance of the deed and reversed the judgment. We quote from the opinion as follows: "But it is said that the decisions of this court recognize the right of the grantee by absolute deed to possession of the land, even when the deed is given by way of security. There is certainly a *dictum* to that effect in Wetherby v. Green, 22 Mich. 311, 321, and decisions in Bennett v. Robinson, 27 Mich. 26, and Jeffrey v. Hursh, 42 Mich. 563. *But these were cases in which the party claiming against the deed was entitled to the rights of a mortgagor in*

find a verdict for the defendants if satisfied on the whole evidence that the deed referred to was intended as a mortgage, and they found for the defendants. This ruling was erroneous. The jury should have been instructed as requested by plaintiff's counsel. In Wetherbee v. Green, 22 Mich. 311, it was strongly intimated that an absolute deed, although intended as a mortgage and permitting redemption would confer a right of possession on the grantee wholly unaffected by the statute prohibiting ejectment by a mortgagee before foreclosure, and in the later case of Bennett v. Robinson, 27 Mich. 26-30, it was distinctly laid down that although as between the parties such a transaction is a mere security, attended by a right of redemption, and requiring foreclosure to cut it off, it is one which "places the right of possession in the grantee or mortgagee." This is decisive. For admitting that in fact the absolute deed from Mrs. Hursh was intended as a mortgage, it was no defense against the plaintiffs' action for possession, and they were entitled to prevail, notwithstanding according to her construction of the transaction her remedy would be in equity and not by ejectment. The judgment of the circuit court must be reversed with costs and a new trial granted.

[40] Jeffery v. Hursh, 49 Mich. 31.

[41] Buell v. Irwin, 24 Mich. 145; Ryders v. Flanders, 30 Mich. 336; Harriet v. Kinney, 44 Mich. 457; Geiges v. Grenier, 68 Mich. 153; Whiting v. Butler, 29 Mich. 122; Mich. Land Co. v. Thoney, 89 Mich. 226; Paldi v. Paldi, 95 Mich. 410; Hays v. Livingston, 34 Mich. 394; Yale v. Stevenson, 58 Mich. 537.

[42] 51 Mich. 105.

equity only. In none of them had the mortgagee given any writing in the nature of a defeasance, and in none could the debtor's right be shown except by proving an oral understanding. Nothing of the sort is necessary here, nor is any oral understanding relied upon. The papers show that the relation of mortgagor and mortgagee continues and the contract of sale is nothing but a defeasance." Oral evidence had, however, been introduced to show the surrounding facts and circumstances, and it is evident that the defense could not have been made good without such evidence, for in another portion of the opinion the court says: "*The controversy thus stated is not one which necessarily must be determined upon the face of the papers; if it was the plaintiffs would unquestionably be entitled to retain their judgment.*"

It will be observed that Justice Cooley (who wrote the opinion) gives his consent somewhat grudgingly to the authority of the cases which he cites, and he points out that these were cases in which the party claiming against the deed was entitled to the rights of a mortgagor in equity only. But surely his attempt to distinguish these cases from Ferris v. Wilcox only makes "confusion worse confounded." Can it be that to show an oral defeasance to a deed constitutes an equitable defense, while to show by parol that a contract and deed amount only to a mortgage constitutes a legal defense? Yet what else do the italicized sentences in the foregoing quotation amount to?

The rule forbidding parol evidence in an action at law to show that a deed absolute on its face was intended as a mortgage, arose at a time when the real character of the instrument could even in equity only be shown when fraud or mistake, etc., was charged in connection with its execution. The rule of evidence was broader in equity only because the grounds of relief of which that court took cognizance were broader. The admissibility of the evidence was merely an incident to the equitable relief. Unless facts showing a basis for that relief were charged parol evidence was as much excluded in equity as at law.[43] When the parties had deliberately executed an absolute deed, intending it as security, neither court allowed them to show that intention by parol evidence,[44] and when this was at length permitted in equity it was, it would seem, as great an innovation upon rules of evidence as if it had been permitted at law. Yet many of the latter courts adhered to the old rule after it had been abandoned by the former.[45] And the cases at law where parol evidence was held inadmissible have been cited in support of the doctrine that a deed absolute in form passes the right of possession to the mortgagee.[46] This failure to distinguish between a rule that relates to procedure only and one that declares a substantive right has resulted in much confusion.

Negative View—New York Cases—Weight of Authority.—It was never contended by the New York courts that a mortgagee under deed absolute in form gained any substantive rights not incident to an ordinary mortgage. The controversy there was as to whether after the parties had made an absolute deed it could by parol evidence be turned into a mortgage, except upon grounds recognized as peculiarly equitable. In the early case of Stevens v. Cooper[47] this was denied, and although upon this point the utterance of the court is a mere *dictum*, the *dictum* was afterwards recognized as authority. But in Lane v. Shears,[48] decided in 1828, such evidence was held competent without qualification, even in a court of law, and this continued to be the rule[49] until in 1843 upon the apparent authority of Stevens v. Cooper, the court of errors, in the case Webb v. Rice,[50] held that a deed could not in a court

[43] 3 Greenl. Ev. (15th Ed.) 360-365; 2 Story, Eq. Jur. 1195.

[44] Stevens v. Cooper, 1 Johns. Ch. 429. Dissenting opinion in Fuller v. Parrish, 3 Mich. 211, and cases cited.

[45] See Am. & Eng. Ency. of Law (1st Ed.), vol. 6, p. 675, citing the following cases: Benton v. Jones, 8 Conn. 186; Reading v. Weston, 8 Conn. 120; Bryant v. Crosby, 36 Me. 562; Baily v. Knapp, 79 Me. 205; Hogel v. Lindell, 10 Mo. 483; Webb v. Rice, 6 Hill, 219; Farley v. Goocher, 11 Iowa, 570; McClane v. White, 5 Minn. 178; Belote v. Morrison, 8 Minn. 87; Bragg v. Massey, 38 Ala. 89; Parish v. Gates, 29 Ala. 254; Moore v. Wade, 8 Kan. 380; Ellis v. Higgins, 32 Me. 34.

[46] See dissenting opinion in Jackson v. Lodge, 36 Cal. 28.

[47] 1 Johns. Ch. 429.

[48] 1 Wend. 433.

[49] Gilchrist v. Cunningham, 8 Wend. 641; Roach v. Cosine, 9 Wend. 227; Swart v. Service, 21 Wend. 37; Stewart v. Hutchings, 13 Wend. 485; Nelson v. Sharp, 4 Hill, 584.

[50] 6 Hill, 219.

of law be shown to have been intended as a mortgage and overruled the intervening contrary decisions. About this time, however, the adoption of the Code made equitable defenses available at law, and thereafter parol evidence was received in both courts.[51] Webb v. Rice, however, gave no countenance to the doctrine that a deed absolute in form passes the legal title, or gives the mortgagee greater rights that an ordinary mortgage. The contrary doctrine had been several times suggested by previous decisions. Thus, in Stewart v. Hutchings,[52] the court, referring to the statutes forbidding ejectment by the mortgagee, which we have already quoted, said: "This language is exceedingly broad and comprehensive and embraces in its terms every description of mortgage which could previously have been made the foundation for an action in ejectment." Again, in Lane v. Shears,[53] where the deed was absolute in form, the court used the following language: "If Shears had only the interest of a mortgagee in these premises, then no conveyance from him to Lane was necessary to restore to Lane the entire title. A mortgagee has but a chattel interest, the fee remains in the mortgagor. Payment of the debt is an extinguishment of the mortgage." These cases were overruled by Webb v. Rice, so far only as they were authority for the introduction of parol evidence in an action at law to prove that a deed had been intended as a mortgage. Webb claiming under a full warranty deed brought ejectment, and his declarations subsequent to the execution of the deed were admitted by the trial judge to show that the deed had been given as security. The court of errors, overruling the supreme court, held that the evidence should have been excluded, but not because a mortgage in that form gave an actual substantive right to possession, the decision had relation to procedure only, to the admissibility of the evidence; the doctrine suggested by Stewart v. Hutchings, and Lane v. Shears, was not called in question at all.

This broad doctrine was specifically declared in Carr v. Carr.[54] The court there said: "The fact once established either by the terms of the conveyance or by other evidence that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees, and the conveyance remains but a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor or those claiming under him until after foreclosure." And more recently, in Shattuck v. Bascom:[55] "Although the conveyance from the defendant Coleman was in form a deed, it was in fact a mortgage and had all the incidents of a mortgage. * * * All he" (the mortgagee) "acquired by the deed was a lien on the land for the security for his debt." And numerous other New York decisions are to the same effect.[56] The New York doctrine is in line with the decided weight of authority. In Meighen v. King,[57] the Minnesota court said: "There seems some inconsistency in the position taken by the courts in the former States, for whether the question be treated as legal or equitable, the relations and rights of the parties, and the question whether mortgage or not should be determined by the original transaction. If it is then a mortgage it cannot become an absolute conveyance by anything happening subsequently. And yet those courts, while regarding it as a mortgage, if there has been no default, or in case there has, if the mortgagor tender performance, regard it and enforce it as an absolute conveyance, so far as concerns the right of possession, if there has been a default which the mortgagor does not offer to remove, thus making the rights of the parties depend not solely on the original character of the instrument and the intention with which it was executed, but in part, at least, on subsequent events.

[51] Despard v. Walbridge, 15 N. Y. 374. This case assumes that a defense based upon the fact that a deed was intended as security, is an equitable defense, although the form of the instrument was the result of the deliberate action of the parties, and not of fraud, accident, undue influence, etc. We have noticed the confusion in the Michigan cases upon this point.

[52] 13 Wend. 485.

[53] 1 Wend. 433.

[54] 52 N. Y. 253.

[55] 105 N Y. 39.

[56] Murray v. Walker, 31 N. Y. 399; Fiedler v. Darrin, 50 N. Y. 444; Hodges v. Insurance Co, 8 N. Y. 416; Carpenter v. Mining Co., 65 N. Y. 51; Morris v. Budlong, 78 N. Y. 543; McCauley v. Smith, 132 N. Y. 531; McMahon v. Macy, 51 N. Y. 161; Odell v. Montrose, 68 N. Y. 500.

[57] 31 Minn. 115, 16 N. W. Rep. 702.

"We are unable to see why the rights of the parties, under such a mortgage are not fixed and absolute, and as little dependent upon judicial discretion as in the case of an ordinary mortgage." And in Brinkman v. Jones[58] the Wisconsin court said: "By a mortgage in its ordinary form there is an absolute grant of the title to the lands in terms to the mortgagee, with a defeasance as a separate clause; the fact that this separate clause is in a separate paper, or by parol, does not in the least enlarge or change the nature of the grant. The law has definitely said that no matter what the form of the deed or conveyance, if it be given and intended as security for a debt due or for money loaned it shall be a mortgage with all its attributes and nothing more." The same view is taken by the courts of Indiana,[59] California,[60] Washington[61] and Dakota.[62]

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[58] 44 Wis. 498. See, too, Holle v. Bailey, 17 N. W. Rep. 322.

[59] Cox v. Ratcliffe, 105 Ind. 374; Beatty v. Brummett, 94 Ind. 76; Heath v. Williams, 30 Ind. 495; Parker v. Hubbell, 75 Ind. 580; Creighton v. Hoppis, 99 Ind. 369; Smith v. Parks, 22 Ind. 59; Crane v. Buchanan, 29 Ind. 570.

[60] See cases cited in note 22.

[61] Snyder v. Parker, 53 Pac. Rep 59.

[62] Shimerda v. Wohlford, 82 N. W. Rep. 393.

PARTNERSHIP—SUBROGATION.

SANDS' ADMR. v. DURHAM.

Supreme Court of Appeals of Virginia, March 14, 1901.

Where a partnership has been dissolved, the social assets exhausted in the payment of partnership debts, and a settlement of the partnership accounts made, from which it appears that one partner was in advance to the firm, and with his individual means has paid judgments against it, he is entitled to be subrogated to the rights of the judgment creditors whose judgments he has discharged, and to subject the land owned by his co partner at the time of the docketing of the judgments to their satisfaction.

WHITTLE, J.: An opinion was handed down in this case in June, 1900 (36 S. E. Rep. 472), but this court not being satisfied with the conclusion then reached a rehearing was granted.

There is but this single question presented for decision: Where a partnership has been dissolved, and the social assets exhausted, and judgments subsequently recovered against the members of the firm on partnership debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means, and this is shown by a settlement of the partnership accounts, is the partner who has paid the judgments entitled to be subrogated to the rights of the creditors whose judgments he has satisfied against the real estate of his co-partner, in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability?

The doctrine of subrogation is independent of any mere contractual relations existing between the parties to be affected by it, and involves the equitable principle that where one who is secondarily liable has paid the debt of another, who is primarily liable therefor, he will, in equity, be substituted to all the rights and remedies of the creditor against the party whose share of the joint liability he has been compelled to discharge. Sheldon, in his work on Subrogation, states the doctrine thus: "The usual rule is that one of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional shares of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as a principal debtor for that part of the debt which he ought to pay, and as surety for his co-debtors as to the part of the debt which ought to be discharged by them." Sheld. Subr., § 169, citing Morrow's Admr. v. Peyton's Admr., 8 Leigh, 54; Boyd's Exrs. v. Boyd's Heirs, 3 Gratt. 113.

Subrogation has been denominated as one of the benevolences of the law, created, fostered, and enforced in the interest and for the promotion of justice.

In England, and in a few of the States of the Union which have adopted the English rule, the application of the doctrine is very much restricted. Indeed, prior to an act of parliament (St. 19 and 20 Vict., ch. 97), the courts had held that even a surety who satisfied a judgment against himself and his principal was not entitled to be subrogated to the rights of the creditor, and to have the judgment kept alive for his benefit. Copis v. Middleton, 4 Turn. & R. 229; Hodgson v. Shaw, 3 Mylne & K. 190. But by the act of parliament aforesaid, the doctrine was extended to sureties.

With the exception of the courts of Alabama, Vermont and North Carolina, the English rule has not been followed in this country.

In most of the other States it has been extended until, in its practical application, it has been deemed broad enough to cover every instance in which one party has been required to pay a debt for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter.

In no other jurisdiction has the doctrine been more firmly adhered to, or more liberally expounded and applied, to meet the exigencies of particular cases, than in Virginia.

In Powell's Exrs. v. White, 11 Leigh, 309, this court expressly repudiated the doctrine of Copis v. Middleton, 1 Turn. & T. 229, and Jones v. Davids, 4 Russ. 277. In a review of these cases found in a note to Dering v. Earl of Winchelsea, 1 White & T. Lead. Cas. Eq., pt. 1, p. 140, it was remarked: "In the more recent case of Powell's Exrs. v. White, 11 Leigh, 309, the decisions in Copis v. Middleton and Jones v. Davids, were thoroughly examined in the court of appeals, and the Virginia practice was vindicated against the authority of Lord Elden, with distinguished and convincing ability."

This court said, in Enders v. Bruno, 4 Rand. 447: "It has nothing of form, nothing of technicality about it; and he who, in administering it, would stick in the letter, forgets the end of its creation and perverts the spirit which gave it birth. It is the creature of equity, and real, essential justice is its object."

In Tomkins v. Mitchell, 2 Rand. 428, it was enforced in behalf of the principal debtor against a co-debtor, where the former had paid more than his proportion of the debt, by substituting him to the rights of the creditor whose vendor's lien he had discharged; the court holding that, as between themselves, each was a principal debtor for his one-half of the debt, and the one paying more than one-half was surety as to the excess paid by him.

In Wheatley's Heirs v. Calhoun, 12 Leigh, 264, the parties were partners. The original debt was a joint obligation, but not a partnership debt. Subsequently the firm made its notes therefor, and secured them by a lien on the property for which the debt was created. Afterwards one of the partners paid the entire debt, and he was subrogated to the lien of the creditor whose debt he had satisfied.

In Gatewood v. Gatewood, 75 Va. 415, it was declared that subrogation would be enforced in favor of sureties and others who are required to pay in order to protect their own interest.

In Dobyns v. Rawley, 76 Va. 537, the consideration of real estate sold and conveyed by Fulton to Rawley and Davis jointly was $5.000, for the payment of which they executed their joint bonds. In a subsequent division of the land between the purchasers, Rawley's parcel was rated at $3,000, and Davis' at $2,400, and in this proportion they were to discharge their joint indebtedness to Fulton. It was held that the legal effect of the arrangement was that, as between the two purchasers and in relation to each other, they were principal debtors for their respective portions of the purchase money, and each was surety for the other's portion, and that, if either paid more than his agreed share, he became entitled to all the rights and remedies of a surety—to subrogation among the rest—against the other for repayment of such excess.

This principle was recognized in Horton v. Bond, 28 Gratt. 825, as the true ground for substitution to enforce contribution among co-sureties. It was there said: 'Sureties are not only sureties for the principal debtor for the whole debt, but, as among themselves, each is surety for the other to the extent of the excess of the whole debt beyond his proportionate part thereof."

In Pace v. Pace's Admr., 95 Va. 792, 30 S. E. Rep. 361, it was held that the liabilities of a decedent's estate and the rights of his creditors are fixed by his death. If at that time a creditor has the right to prove a debt against a decedent's estate for which the decedent and another are bound as sureties, and subsequently the co-surety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full.

Buchanan v. Clark, 10 Gratt. 164, is relied on as sustaining the contention that subrogation does not obtain among partners. The facts of that case are as follows: K, B, and G, who had formed a partnership for the purchase and sale of cattle, executed a joint bond to C. Cattle were sold, and G was supplied with money arising from the sales, for the purpose of paying the bond to C and all other partnership debts. It was agreed that G should be the principal, and K and B sureties only, for said debts. The bond was not paid, and C recovered judgment thereon against K, B, and G. G was insolvent, and K and B satisfied the judgment. Subsequently to the recovery of said judgment, G sold certain real estate, and K and B filed a bill in equity against G and his alienees, setting forth the foregoing facts, and praying that they might be subrogated to the rights of C under the judgment. The court held that it was competent for K, B, and G to contract that, as between themselves, G should be principal and K and B his sureties; that, as between themselves, K and B were entitled to be subroga.ed to the lien of the judgment creditor; and that they were equally entitled against the purchasers from G, who did not show a better equity. The court said: "I do not think, therefore, that there is anything in the objection that the debt when contracted was a partnership debt, and that with respect to the creditor it retained its original character. As between themselves, they occupied the relation of principal and sureties."

It will be observed the court was dealing with a case of "convention subrogation," and confined its decision to the case in hand, without intimation as to whether the general doctrine of subrogation would or would not obtain among partners.

Bispham's Principles of Equity is also relied on to show that the doctrine does not apply to partners, and that author does say, at section 337: "The right will not, however, exist between parties who are equally bound,—as, for example, co-partners, co-obligors, and co-contractors,—

except, of course, by virtue of special contract."

His statement is general, is not confined to co-partners, but embraces all co-contractors; and, as has been seen from the authorities reviewed, it is not, without qualification, a correct exposition of the Virginia doctrine. Of course, so long as such parties remain equally bound, the right does not attach, but they cease to be equally bound when one obligor discharges an obligation resting upon himself and his co-obligor. Both are bound to the obligee; but, *inter se*, each is primarily, not equally, liable for his own share, and secondarily liable for the share of the other, and when he pays the share of such other all the conditions essential for the application of the doctrine arise.

In Baily v. Brownfield, 20 Pa. 41, cited to sustain the text, there is an *obiter* to the effect that a partner who has paid a partnership debt cannot be substituted to the creditors' rights. But in that case there had been no settlement of partnership accounts, and there was nothing to show that the partner asserting the right of subrogation had paid more than his share. It was therefore properly denied.

In the later case of Fessler v. Hickernell, 82 Pa. 150, subrogation was denied one partner against another, for the reason that until there had been a settlement of partnership accounts there was no means of ascertaining whether any, and, if any, what balance was due to the partner demanding subrogation. But the right of a partner, who had been shown by a settlement of partnership accounts to have paid more than his share, was conceded in that case.

In the still more recent case of Ackerman's Appeal, 106 Pa. 1, subrogation was allowed between principal debtors, the court holding that they were principals so far as their creditor was concerned, but each was surety as to the share of the other.

Thus it appears that the Pennsylvania cases do not sustain the general proposition laid down by Bispham, but are in accord with the decisions of this court.

In Sells v. Hubbell's Admrs., 2 Johns. Ch. 394, Chancellor Kent said: "The debt of Sells was the debt of the co-partnership of Bedient & Hubbell. It was the common equal debt of both partners, and the consideration for which it was created is presumed to have inured equally to the benefit of both, and the contribution ought to be equal. The estate of each partner ought to be charged with the debt in equal portions, provided their interests in the co-partnership were equal, and their accounts as between each other were equal. This is the intendment, in the first instance, and it would be a thing almost of course for equity to allow the representatives of a deceased partner, who had to pay the whole debt, to be substituted in the place of the creditor, in order to recover, from the surviving partner or his estate, a moiety of what they had paid. Nothing could stay this proceeding but the allegation of the surviving partner that he was the creditor partner, and that the estate of the deceased partner owed him a balance as much or more than it had been obliged to pay. This would render it necessary to take and state an account between the partners before this court could interfere in any way to enforce the claim for contribution."

In the case under consideration, the partnership had been dissolved, the social assets had been exhausted in the payment of partnership debts, and a settlement of the partnership accounts had been made, from which it appeared that the appellee, J. H. Durham, was in advance to the firm, and with his individual means had paid the judgments against it. Under these circumstances, the circuit court was of opinion and decreed that appellee was entitled to be subrogated to the rights of the judgment creditors whose liens he had discharged, and to subject the real estate owned by his co-partner, D. A. Early, at the date of the recovery and docketing of said judgments, to their satisfaction.

This court is of opinion there is no error in said decree, and that it ought to be affirmed.

NOTE.—*Recent Cases on the Right to Subrogation of Joint Debtors and Partners.*—Before entering upon a review of the important doctrine asserted by the principal case, we desire to take exception to the statement of the court denominating subrogation as "one of the benevolences of the law." While the idea of the court is probably that the application of this doctrine aims at substantial justice rather than at a strict adherence to technicalities, still the use of the word "benevolence" is a most unhappy one. No doctrine is more pernicious than the one which insists upon inducing a spirit of benevolence in the application of the law. The law can, in the nature of things, never be generous; it must always be just, and just according to fixed rules and principles. Both the moral and natural law are inexorable; man breaks them and the punishment falls swift, and is never tempered by mercy. If it were otherwise, the universe would still be *chaos* instead of *cosmos*. Subrogation, therefore, is not an act of judicial charity, nor a "benevolence" of the law, but an equitable right resting upon the clearest equitable principles. It is true that subrogation arises rather from natural justice than from contract, but natural justice is equity and not benevolence. McNeil v. Miller (W. Va.), 2 S. E. Rep. 335. Neither is the right limited to those who stand in the relation of principal and suretiy, but has a most general application; indeed, as one court has said, "it is the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it." Arnold v. Green, 116 N. Y. 566. This court further holds that this right is only applied where the party seeking the aid of the court and the benefit of the rule is no mere volunteer, and where his action is based upon general equitable rules which it is the particular province of a court of equity to enforce. Subrogation is therefore the substitution of one who under the compulsion of necessity or for the protection of his own interest has discharged a debt in full for which another is primarily liable, in the place of the creditor, with all the security, benefits, and advantages held by the latter with respect to the

debt. Beach, Equity Jur. sec. 798; Knowles v. Roblin, 20 Iowa, 101; Arnold v. Green, 116 N. Y. 566; Wall v. Mason, 102 Mass. 316.

In the case of joint debtors the reason of the rule is clear, although the rule itself has been denied in some jurisdictions. In such case each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as surety for his co debtors as to that part of the debt which ought to be discharged by them. The following cases deny the right of subrogation among joint debtors: Greiner's Estate, 2 Watts (Pa.), 414; Clark v. Warren, 55 Ga. 575; Engels v. Engels, 4 Ark. 286; Benton v. Bailey, 50 Vt. 137. But these cases no longer represent the overwhelming current of modern authority which generally hold that the same principles of subrogation apply between joint debtors as between principal and surety. Randolph v. Starke, 26 South. Rep. 59; Gilfillan v. Dewoody, 157 Pa. St. 601. The following carefully considered cases illustrate the wide application of this very important rule of equity.

Where one of several proprietors of land pays the whole cost of a pavement laid on the requirement of the municipal authorities, for which the property was bound, and the proprietors were individually liable, he will be subrogated to the rights of the payer to enable him to recover their proportions from the other proprietors. Whitehead's Succession, 3 La. Ann. 396. A stockholder of an insolvent bank who has been compelled to pay a claim of a creditor because of his additional statutory liability, is not entitled to be subrogated to the creditor's interest in the assets of the corporation. Sacramento Bank v. Pacific Bank (Cal., 1899), 56 Pac. Rep. 787. Where joint debtors mortgage their common property in its entirety for the whole debt, one of them who has paid the debt is subrogated to the rights of the mortgage as against the other. Randolph v. Starke, 26 South. Rep. 59. Where no lien was retained for property sold to persons who gave their joint note for the price, one of the makers by paying the note cannot obtain any relief against the property on the ground of subrogation, since he merely stands in the vendor's shoes. Harris v. Elliott, 32 S. E. Rep. 176. The fact that a member of a firm who had purchased land individually and given a bond for the purchase money which was signed by his partners as sureties afterwards drew money out of the partnership which he paid on such bond, does not entitle the partners to a lien on the land for the repayment of the sum withdrawn. Grover v. Wilson (Ky., 1896), 37 S. W. Rep. 60. Where one of two joint obligors on a judgment pays the judgment before it has become a lien on their land by record of the abstract the judgment is discharged and the obligor making the payment cannot, under the doctrine of subrogation, by subsequently recording the judgment, render it an equitable lien on the land of the other for the amount due by way of contribution. Morris v. Davis (Tex. Civ. App.), 31 S. W. Rep. 850. To entitle a joint debtor on a judgment, to subrogation to the rights of the judgment creditors upon a purchase by him of the judgment, it must appear that it was his intention in making the purchase to acquire these rights. Huggins v. White, 26 S. W. Rep. 1066. A partner who pays a firm debt, after dissolution, is generally required to enforce his right by way of contribution against his co-partner rather than by subrogation to the rights of the creditor. Phillips v. Blatchford, 137 Mass. 510. A note on which judgment was rendered against A and L was executed by them while partners to secure a joint debt. After the judgment they dissolved partnership; A paying off an individual obligation of L, who in consideration agreed to pay such judgment. Thereafter property of A was levied upon and the amount of the judgment collected therefrom. Held that A was entitled to be subrogated to the rights of the judgment creditor against L. Gilfillan v. Dewoody, 157 Pa. St. 601. The subrogation of one partner who has paid a firm debt to the position of the creditor as against his co-partners, cannot ordinarily be enforced without a settlement of the partnership accounts. Bittner v. Hartman, 139 Pa. St. 632; Barbyd v. Perry, 57 Iowa, 416; Lyons v. Murray, 95 Mo. 23. As between the purchasers in common of an estate bound by a joint lien, each share is obliged to contribute only its proportion of the common burden and beyond this amount is to be regarded as the surety of the others. Higbam v. Harris, 108 Ind. 246.

The rule of subrogation as it applies to the limits of our subject may be succinctly stated as follows: The main consideration in the application of this principle is the absolute justice of the plaintiff's position. He must come into equity with clean hands, and a meritorious claim, and must in addition show that the enforcement of his right will work no injustice to others. He must show further that he has paid the indebtedness to protect some valid pecuniary interest he has in the subject-matter, or by virtue of some agreement with his co debtor or the one primarily liable He must also have paid the debt in full, and in case of a partnership must abide a settlement of the partnership accounts. Under such conditions the right of a joint debtor to subrogation against his co debtor is as absolute as that of a surety against his principal under similar conditions.

A. H. ROBBINS

BOOK REVIEWS.

HUMAN NATURE EXPLAINED.

There is an old and much used saying we have in our youth often heard used among farmers, "He hasn't much book learning, but he knows human nature." Such remarks were generally applied to successful men who were uneducated. Men of genius are born, not made. Heredity is more potent than education. The army of great men in great cities is continually being replenished from the humble walks of humble, unlettered rural life. They as frequently spring from parents of but medium, perhaps quite inferior mental qualifications, showing that heredity goes behind, underlies, is deeper in its origin than its physical parentage. May not intellects, the soul, the mental thinking part of man, return to earth many times? Can any one disprove reincarnation? There is much that looks like it.

If any one needs a knowledge of human nature it is the lawyer; he must understand opposing counsel; must know his client; the witnesses; must read the faces of the jurors; there is even profit in handling the judge tenderly; he frequently is great, only during his short term of office. What is the quality in counsel that will enable him to know, to see through, and interpret the men with whom he must deal in the court room. Can this quality be acquired? In some degree at least it can, and this book will assist one to acquire that knowledge. The author says that the ability to read the minds of others comes of, and is the result of a sensitive mind, that in turn makes it susceptible to the wiles of others, and an easy prey

of designing selfishness. We somewhat doubt this, but if it be true of the inherent natural mind reader, will it be true of one who may acquire the mind reading qualifications? He also says that many of the vilest deeds and darkest crimes are not expressions of the one who perpetrated the crime, and that when the laws of magnetism are better understood, courts and public sentiment will be able to deal far more justly with unfortunate humanity. The book has a good many photo engravings illustrative of different characteristics grouped in twos, showing the extremes, the strong and the weak, of various temperaments. Many well known and familiar faces appear among these illustrations. The author is N. M. Riddell, Ph. D., scientific lecturer and reformer. Published at New York Phrenological Institute, 341 Fifth Avenue, N. Y. The book contains 400 pages, 12 mo, bound in cloth.

WEEKLY DIGEST

1. ADMINISTRATION—Executors—Power to Sell Lands.—Where no express power to sell lands is given in a will to the executor, such power will not arise by implication, unless the implication is clear from the terms of the entire will; and it must be found that some duty has been imposed by the testator upon the executor, which necessarily carries with it a power of sale in order to enable him to perform the duty.—CHANDLER v. THOMPSON, N. J., 48 Atl. Rep. 583.

2. MASTER AND SERVANT — Assault by Brakeman — Liability of Master.—In an action for personal injuries, the evidence showed that plaintiff was stealing a ride on defendant's freight train; that he was pursued on the train by a brakeman, and, jumping therefrom, was followed by the brakeman, who jumped from the car on top of him, breaking his leg and otherwise injuring him. Held, that the question whether the assault of the brakeman was commenced before he left the car, and was therefore in the line of his employment, so as to render defendant liable, was for the jury.—GIRVIN v. NEW YORK CENT. & H. R. R. CO., N. Y., 59 N. E. Rep. 921.

3. ATTACHMENT—Dissolution.— Although one sues out a writ of attachment for a larger amount than he is entitled to, he may yet sustain the attachment for the amount to which the testimony on trial shows he is entitled to.—E. B. WILLIAMS & CO. v. LOUISIANA LUMBER CO., La., 29 South. Rep. 491.

4. ATTORNEY AND CLIENT—Suits—Authority to Institute—Judgment.—Where attorneys brought action on a foreign judgment, submitting a certified copy of the record of the judgment, and the defendant produced a statement by the plaintiff that the action was without authority, it was properly dismissed, in the absence of proof of authority, regardless of whether the attorneys could show that the original plaintiff had assigned the judgment to another, as a copy of the record was no evidence of ownership.—BELL v. FARWELL, Ill., 59 N. E. Rep. 955.

5. BANKS AND BANKING—Officers—Insolvency — Set-off.—Where the vice president and attorney of an insolvent bank was indebted to it on notes secured by a mortgage, he was estopped to set up claims arising from a liability accruing against him as surety on an attachment bond, and for money which he borrowed on his personal credit and gave to the bank's cashier, as a set-off against his liability on the debt due the bank; and hence he was not entitled to maintain a bill to restrain the receiver of the bank from foreclosing the mortgage.—CHAPMAN v. CUTRER, Miss., 29 South. Rep. 467.

6. BENEVOLENT SOCIETY—Power of Officers—Waiver of By-laws.—Where the constitution and by-laws of a mutual beneficial association limit the appointment of its officers and the scope of their powers and duties, and forbid the alteration or amendment of such constitution except by the governing body in the mode therein provided, and where the members of such association have agreed as part of their contract of membership to strictly comply with the laws, rules and regulations of the association, the officers thereof have no power to waive the provisions of such by-laws as relate to the substance of the contract between the individual member and his associates in their corporate capacity.—KOCHER v. SUPREME COUNCIL CATHOLIC BENEV. LEGION, N. J., 48 Atl. Rep. 544

7. CARRIERS—Passenger—Negligence—Res Ipsa Loquitur.—The doctrine of *res ipsa loquitur* does not apply, so as to authorize a recovery by a passenger for injuries sustained while alighting from a car, the step of which was not more than 18 inches from the platform, where none of the attending circumstances tended to show negligence on the part of the carrier.—TEXAS MIDLAND R. CO. v. FREY, Tex., 61 S. W. Rep. 442.

8. CARRIERS—Passenger—Permits—Contract of Carriage.—Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of such a permit, the company is not liable because its conductors have violated such rule, unless it has been so frequently violated as to warrant the conclusion that it is not enforced.—HOUSTON E. & W. T. Ry. Co. v. WHITE, Tex., 61 S. W. Rep. 436.

9. CARRIERS OF GOODS—Power of State to Regulate Freight Charges—Commerce.—A State has no power to regulate the charges of a railroad company for the carriage of goods between two points in the State, where the course of transportation must be for a considerable part of the distance through another State or territory. Such transportation, although continuous and made on through bills of lading, constitutes commerce "among" the States, within the meaning of the commerce clause of the federal constitution, and is subject to regulation by congress alone.—KANSAS CITY S. RY. CO. v. BOARD OF RAILROAD COMMISSIONERS OF ARKANSAS, U. S. C. C., W. D. (Ark.), 106 Fed. Rep. 353.

10. CONTRACT—Acceptance—Option.—An offer to enter into a contract must be accepted within a reasonable time, in order to render it obligatory.—MCCRACKEN v. HARNED, N. J., 48 Atl. Rep. 513.

11. CONTRACT—Breach—Damages.—The contract of a carrier to furnish a person with a certain number of cars, at a certain price per car, for shipment of freight, is not unilateral or without consideration, where it imposes on such person the obligation to load the cars and have weekly inspection and shipments.—BAXLEY v. TALLAHASSEE & M. R. CO., Ala., 29 South. Rep. 451.

12. CONTRACTS — Consideration —Note—Insurance—Agent — Personal Liability. — Where an insurance agent, pursuant to an agreement with the insured, issued a policy, and paid the premium to the insurance

company, and took the notes of the insured therefor, the transaction was, in effect, a loan by the agent to the insured, and there was therefore full consideration for the notes, though the company was then in fact insolvent, and was soon after placed in the hands of a receiver.—HUDSON v. COMPERE, Tex., 61 S. W. Rep. 389.

13. CONTRACTS—Monopoly—Restraint of Trade.—The defendants, manufacturing 85 per cent. of the envelopes of the country, entered into an agreement with plaintiff, a small manufacturer, by which they agreed that envelopes should not be sold by any of the parties except at the price fixed by the defendants' agent. Held, that such contract is void, as threatening a monopoly in restraint of trade in a useful article, since it gives to defendants, through their agent, the exclusive right to fix the price at which the manufacturers of envelopes should sell their output during the term of the contract, the object being to obtain better prices for the goods manufactured.—COHEN v. BERLIN & JONES ENVELOPE CO., N. Y., 59 N. E. Rep. 906.

14. CONTRACTS—Promise to Adopt One as Child.—Where plaintiff performed services for defendant in consideration of defendant's promise to adopt him and make him defendant's heir, plaintiff cannot, during the life of defendant, if ever, recover the value of the services rendered, though defendant acted fraudulently in making the promise, and now declares that he does not intend to carry out the contract, as he may yet conclude to do so.—PITTMAN v. PITTMAN, Ky., 61 S. W. Rep. 461.

15. CONTEMPT—Punishment—Appeal. — A punitive order of the court of chancery, fining or imprisoning a party for contempt, is not appealable, if the matter and party be within the jurisdiction of the court.—GRAND LODGE, K. P. OF NEW JERSEY, v. JANSEN, N. J., 48 Atl. Rep. 526.

16. CONTRACT — Rescission. — Where a party has been induced by fraudulent misrepresentation to enter into a written contract, and has paid money upon it, he may maintain an action for deceit against the party guilty of the fraud, or, after legally rescinding the contract, he may recover in an action of *assumpsit* what he has paid upon it, but the rescission must be before suit brought on the basis of fraud.—HANRAHAN v. NATIONAL BUILDING, LOAN & PROVIDENT ASSN., N. J. 48 Atl. Rep. 517.

17. CORPORATIONS — Stockholders — Subscriptions—Waiver of Liability.—Where a person consents to becoming and becomes a stockholder in a corporation, the legal results flowing from that relation cannot be waived by secret understandings between himself and the board of directors that he would not be called on to pay or make good his subscription.—JACKSON FIRE & MARINE INS. CO. v. WALLE, La., 29 South. Rep. 503.

18. COURTS—Conflicting Jurisdiction of State and Federal Courts.—Where a case commenced in a State court is transferred to a United States court, which afterwards makes an order remanding the case forthwith to the State court, and a certified copy of the order of remand is filed in the State court on the same day, the jurisdiction of the State court is not devested by a subsequent order of the United States court revoking such remand, and a subsequent judgment by the State court is not invalid, since the United States court cannot modify such order, after its execution, by being certified to the State court.—CHISHOLM v. PROPELLER TOWBOAT CO. OF SAVANNAH, S. Car., 38 S. E. Rep. 156.

19. CRIMINAL EVIDENCE—Homicide—Declarations of Accused.—An entire sentence spoken by an accused a short time prior to the homicide, and overheard by a witness, if admitted in evidence, is not reversible error, if it does not appear wherein it had any bearing on the crime charged. It was not an admission of guilt. On the contrary, it was a denial of a wrong, charged, which had, so far as the record discloses, naught to do with the homicide. If it was used as derivative evidence, then it was admissible as part of the *res gestæ*. Applause by a number of those present at the trial, at once checked by the presiding judge, who particularly directed the jury not to give it attention, and decide the case according to their judgment, offers no ground to set aside the verdict.—STATE v. SPILLERS, La., 29 South. Rep. 480.

20. CRIMINAL EVIDENCE—Preliminary Examination.—Under Pen. Code, § 686, providing that a defendant shall have the right to confront the witnesses against him, except where the charge has been preliminarily examined by a committing magistrate, and the testimony taken down in the presence of defendant, the prosecution cannot introduce the testimony of a deceased witness, which was taken on a former trial of the case.—PEOPLE v. BIRD, Cal., 64 Pac. Rep. 259.

21 CRIMINAL EVIDENCE—Statement of Co-Defendant—Silence of Accused.—Where one is in custody for a crime, his silence cannot be used against him as a confession of the truth of a statement made in his presence by a co defendant, also in custody, whether either of them had been cautioned as required by statute or not.—FUNDERBURK v. STATE, Tex., 61 S. W. Rep. 393.

22. CRIMINAL LAW—False Pretenses.—On trial of an indictment for obtaining money by false pretenses, it is error to permit the jury to convict for falsity not alleged in the indictment.—STATE v. RILEY, N. J., 48 Atl. Rep. 535.

23. CRIMINAL LAW—Misconduct of Jury—Statements in Jury Room.—Code Cr. Proc. art. 817, authorizes the granting of a new trial when the jury receives material evidence after they have retired to consider their verdict. After a jury had agreed on defendant's guilt, but before they had fixed the punishment, one of the jurors stated that deceased was not the first man defendant had killed; and it was also stated that, if certain evidence as to the dying declarations of deceased had not been excluded on defendant's objection, they would have known more about the reason defendant went to the penitentiary at a former time. Held sufficient misconduct to warrant a reversal of a judgment of conviction.—BLOCKER v. STATE, Tex., 61 S. W. Rep. 391.

24. CRIMINAL LAW—Theft — Money — Description.—Under an information for theft, describing the property stolen as "lawful money of the United States," proof of a theft of silver certificates or national bank notes was a variance.—PERRY v. STATE, Tex., 61 S. W. Rep. 400.

25. DEEDS—Delivery—Alteration.—Though a deed, changed, after delivery, by the substitution of another grantee, is ineffectual to pass title, yet, where the original grantee himself procures the substitution to be made, he cannot afterwards repudiate it, and claim title in himself, notwithstanding the alteration.—ABBOTT v. ABBOTT, Ill., 59 N. E. Rep. 958.

26. DEEDS—Evidence to Impeach—Memorandum on Record.—An unsigned memorandum on the margin of the record of a deed is not admissible in evidence to affect the validity of such deed.—NANTAHALA MARBLE & TALC. CO. v. THOMAS, U. S. C. C. of App., Fourth Circuit, 106 Fed. Rep. 379.

27. DIVORCE—Residence of Plaintiff.—A divorce was asked on the ground of desertion. The husband left the wife in Albany, N. Y., where they were then residing. After remaining there for a time, she came to this State, with the purpose, as she testifies, of permanently leaving her old home and of remaining here indefinitely. The desertion continued, and after the statutory period had elapsed she filed her petition for divorce. Held, that she had acquired such a residence as is required by the statute, and, under the testimony, was entitled to the divorce prayed for.—TRACY v. TRACY, N. J., 48 Atl. Rep. 533.

28. EASEMENT—Right of Way — Adverse User.—The

open, notorious, continued, and adverse use of a driveway and footpath across the lands of another, from a residence or place of business to a public road, for more than 20 years, affords a conclusive presumption of a written grant of such right of way.—CLEMENT v. BETTLE, N. J., 48 Atl. Rep. 567.

29. EMINENT DOMAIN—Electric Suburban Railway.—A certain suburban electric railway company was authorized by charter to condemn land for its "corporate purposes." The company filed a petition to condemn a certain wharf lot, to be used for the erection of a power house and coal pockets, which lot was five miles from the nearest point of the railroad, and in a city in which another company had the exclusive right to run cars. Held, that the taking was not for a public use, as the construction of the power house on this particular lot was not essential to the service of the public franchise, but pertained only to the private interest of the company in its business details, and hence was not within the meaning of "corporate purposes," meaning "public purposes."—IN RE RHODE ISLAND SUBURBAN RY. CO., R. I., 48 Atl. Rep. 591.

30. ESTOPPEL—Election of Remedies.—The following rule governing *quasi*-estoppels by the election of inconsistent positions or remedies approved: "A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And, where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position."—CAMPBELL v. KAUFFMAN MILLING CO., Fla., 29 South. Rep. 485.

31. EXECUTION SALE — Redemption — Estoppel.—Where plaintiff gave his attorney an interest in a judgment, and afterwards purchases the debtor's real estate at an execution sale thereunder, the act of the attorney in accepting redemption money from another judgment creditor will estop the plaintiff from compelling the execution of a deed of the property, though he returns the redemption money.—HARTSOCK v. JOHN WRIGHT HARDWARE CO., Colo., 64 Pac. Rep. 245.

32. FALSE IMPRISONMENT—Justification—Subsequent Conviction.—Where a police officer arrested a person for a felony without a warrant and without a reasonable cause, he was liable in damages for false imprisonment, though the person arrested was afterwards found guilty of a misdemeanor in carrying concealed weapons at the time of the arrest, the subsequent conviction for another offense being no cure for the illegality of the arrest on an unfounded charge.—SNEAD v. BONNOIL, N. Y., 59 N. E. Rep. 899.

33. FEDERAL COURTS—Following State Decisions.—A federal court is governed by the law of Texas as settled by its court of last resort,—that a deed of land therein expressly reserving a vendor's lien does not vest the legal title in the vendee.—OLIVER v. CLARKE, U. S. C. C. of App., Fifth Circuit, 106 Fed. Rep. 402.

34. FEDERAL COURTS — Jurisdiction — Case Arising Under Patent Laws.—A complaint for specific performance of an oral agreement to advance money for manufacturing a patented article for a half interest in the profits, to set aside as fraudulent an assignment of an interest in a patent, and, as incidental and supplemental to the main relief, praying that defendant be enjoined from using the assignment, or claiming any interest in the patent, or interfering with complainants' absolute ownership thereof, no infringement or apprehended infringement being alleged, does not state a case arising under the patent law, so as to give federal courts jurisdiction, but one arising under contract.—KURTZ v. STRAUS, U. S. C. C. of App., Third Circuit, 106 Fed. Rep. 414.

35. FEDERAL COURTS—Jurisdiction—Suits by Foreign State.—A suit in equity to set aside an award of arbitrators may be maintained in a court of the United States by a foreign State against a corporation of the State in which the suit is brought, found and served within the district.—REPUBLIC OF COLOMBIA v. CAUCA CO., U. S. C. C., D. (W. Va.), 106 Fed. Rep. 337.

36. FRAUD—Pleading.—In an action for a tort, the defendant pleaded a parol contract by the plaintiff discharging the defendant from liability, and the plaintiff replied that the contract had been obtained from him by fraud and deceit on the part of the defendant. Held, on demurrer, that the general averment of fraud, without setting forth the particulars, was sufficient.—FIVEY v. PENNSYLVANIA R. CO., N. J., 48 Atl. Rep. 553.

37. GARNISHMENT — Property of Defendant—Possession.—An answer by a garnishee that he is in possession of goods of the defendant under a chattel mortgage given to secure indebtedness from the latter to him, and that at the time of the summons he is engaged in selling the goods to satisfy the debt, will not support a judgment against the garnishee for the amount of the debt, since goods so in possession of a mortgagee are his property, and not that of the mortgagor, and hence the answer in legal effect denies that the garnishee has defendant's goods in his possession.—BRAGDON v. BRADT, Colo., 64 Pac. Rep. 248.

38. GAS—Duty to Furnish—Unjust Discrimination.—Under Civ. Code, § 629, declaring that a gas company must supply gas to any person within 160 feet from a main on written application, a company has the right to refuse gas to one who refused to pay rent for a meter, and who did not consume enough gas by a sixth part to pay for the rent of a meter, though other consumers were furnished meters free.—SMITH v. CAPITAL GAS CO., Cal., 64 Pac. Rep. 258.

39. GIFTS — Causa Mortis—Death of Donor.—Civ. Code, § 1151, provides that a gift in view of death may be revoked by the giver at any time. A person made a gift *causa mortis* to defendant, and before her death she brought an action to revoke the gift, but died before trial. Held, that the commencement and prosecution of the action was sufficient to revoke the gift, though it did not proceed to judgment on account of the death of the donor.—ADAMS v. ATHERTON, Cal., 64 Pac. Rep. 283.

40. GIFTS—Evidence to Establish — Declarations.—A gift cannot be established by proof of declarations of the claimed donor that he had given the property to the claimant, in the absence of an actual delivery, and the fact of delivery must be shown by other evidence than such declaration.—CHAMBERS v. MCCREERY, U. S. C. C. of App., Fourth Circuit, 106 Fed. Rep. 307.

41. HOMESTEAD—Head of Family.—Who is the head of a family, within the meaning of section 1, art. 10, of the constitution, exempting homesteads from forced sale, must be ascertained from the facts of each case; and there is no invariable test, based solely upon dependence, and especially legal dependence.—DE COTTES v. CLARKSON, Fla., 29 South. Rep. 442.

42. HUSBAND AND WIFE—Gifts.—The expenditure by a husband of his own moneys, in the improvement of the property of his wife, is presumed to be a gift to her, in the absence of proof of a contrary intent.—SELOVER v. SELOVER, N. J., 48 Atl. Rep. 522.

43. INFANTS — Disaffirmance of Deed — Estoppel.—Where an infant conveyed land to his father to enable the father to become surety in a bail bond, and that fact was recited in the deed as the consideration therefor, the court having accepted the grantee as surety upon the faith of the grantor's testimony in open court that he was 21 years of age, the grantor was estopped, upon arriving at age, to disaffirm the deed; and one to whom he conveyed the land in his effort to do so is affected by that estoppel, so that he cannot claim the land as against the commonwealth, which purchased at a sale made to satisfy a judgment on the forfeited

bond.—DAMRON v. COMMONWEALTH, Ky., 61 S. W. Rep. 459.

44. INJUNCTION — Irrigation Canal — Conveyance.—A conveyance of a canal by deed reserved a perpetual right of way to carry 350 inches of water, subject to the vendor's payment of such proportion of the entire expense of maintaining and repairing such canal as the 350 inches should bear to the entire amount of water from time to time being carried through such canal. Held, that the vendor's successors were not obliged to pay the expenses specified in the reservation as a condition precedent to have their water flow through the canal, the right thereby given being one of reimbursement merely.—SMITH v. STEARNS RANCHOS CO., Cal., 64 Pac. Rep. 261.

45. INTERPLEADER—Costs.—Where plaintiff, in good faith and without collusion, files a bill of interpleader, asking that the court determine the ownership of a fund which he does not own, and which is adversely claimed, he is entitled to his necessary costs and attorney's fees out of the fund, when distributed. —BOLIN v. ST. LOUIS S. W. RY. CO. OF TEXAS, Tex., 61 S. W. Rep. 444.

46. LANDLORD AND TENANT — Distraint — Damage Therefor.—A provision in a lease that the landlord shall not be liable for damages arising from any future distraint is against public policy and void, since, if valid, it would render the court powerless to remedy wrongs done to the tenant.—WATSON v. ROSWELL, Tex., 61 S. W. Rep. 407.

47. LIFE INSURANCE—Suicide—Evidence.—In an action to recover the amount of a policy of insurance, the defense of suicide, to avail the company, must show that every reasonable hypothesis of accidental death is excluded by the evidence. The insured was alone, and was found dead from a gunshot wound, which may have been accidentally inflicted.—BOYNTON v. EQUITABLE LIFE ASSUR. SOC., La., 29 South. Rep. 490.

48. LIMITATION OF ACTIONS—Municipal Corporations —Continuing Trespass.—A city negligently erected a bulkhead in front of plaintiff's premises, which were injured by the gradual sliding of the bulkhead. The statute of limitations covering suits for such injuries declares that such action shall be brought within two years from the time the injury accrued, and another statute requires that notice of claims for injuries against the city shall be given within six months after the injury accrued. Held that, since the injury constituted a continuing trespass, limitations did not commence to run against an action from the time of the first injury, so as to limit plaintiff to a single action for damages for such injury and all prospective damages, but that plaintiff was entitled to recover for damages accruing within a period equal to the period of limitation prior to the filing of the claim.—DORAN v. CITY OF SEATTLE, Wash., 64 Pac. Rep. 230.

49. LIMITATION OF ACTIONS — Railroad Company — Right of Way—Prescription.—A right of way is such a public use as to prevent the running of limitations or the acquisition of adverse title thereto by prescription.—SOUTHERN PACIFIC CO. v. HYATT, Cal., 64 Pac. Rep. 272.

50. MANDAMUS TO MUNICIPALITY—Issue of Bonds.—The power to issue a writ of *mandamus* is a discretionary one, and will never be exercised for the purpose of compelling municipal officers to perform an act which, on the hearing of the application for the writ, is conclusively shown to be illegal, notwithstanding the existence of a prior adjudication affirming the validity of such act.—EDWARD C. JONES CO. v. TOWN OF GUTTENBERG, N. J., 48 Atl. Rep. 587.

51. MASTER AND SERVANT—Contract of Employment. —The plaintiff was employed for 41-2 months as a color mixer by the defendants in the manufacture of wall paper. He agreed to do his work in a workmanlike manner, and to the satisfaction of the defendants. Held, that the defendants had a right to judge for themselves whether his work was satisfactory, and that it should not have been left to the jury to determine whether they ought to have been satisfied. —GWYNNE v. HITCHNER, N. J., 48 Atl. Rep. 571.

52. MASTER AND SERVANT—Contract of Employment—Condition Precedent to Payment of Wages.—Defendant, a mining corporation, suspended work in its mines, and employed plaintiff as care-taker for its property at the agreed wages of four dollars per pay, one-half to be paid at the end of each month, and one-half when the company should resume work or dispose of its property. Held that, there being no time specified when operations should be resumed or the property sold, it was an implied condition of the contract that it should be within a reasonable time, and that, after plaintiff had continued in the employment for four years, he was entitled to recover the wages retained, although defendant had not resumed work nor disposed of its property.—HOOD v. HAMPTON PLAINS EXPLORATION CO., U. S. C. C., D. (Nev.), 106 Fed. Rep. 408.

53. MASTER AND SERVANT—Independent Contractors —Negligence.—Where an electric railway company allowed contractors ballasting the roadbed to operate a car thereon, the company could not escape liability for injuries to an employe from a collision occasioned by the contractors' negligence in operating the signals, on the ground that the injuries were by independent contractors.—ORTLIP v. PHILADELPHIA & W. C. TRACTION CO., Pa., 48 Atl. Rep. 497.

54. MECHANIC'S LIEN—Failure to Perfect—Power of Court to Enforce.—A court of equity cannot create a mechanic's lien, where the claimant has not perfected the same as required by statute, merely because he had an inchoate right to such a lien at the time of the institution of a suit for the administration of the property and the appointment of a receiver therefor. —A. F. WITHROW LUMBER CO. v. GLASGOW INV. CO., U. S. C. C. of App., Fourth Circuit, 116 Fed. Rep. 868.

55. MORTGAGES—Foreclosure—Limitation—Estoppel. —A foreclosure suit was based on the liability specified in the mortgage, and not on a new promise to pay the debt, made before it became barred by the limitation, and before a judgment lien on the premises was created. A demurrer by the judgment creditor was sustained on the ground that the debt was barred, and, plaintiff declining to amend, judgment dismissing the action was entered, after which the creditor, relying on the allegations of the complaint, purchased the property on execution sale under the judgment, without notice of any renewal. Held, in a subsequent suit to foreclose the mortgage, in which plaintiff relied on a new promise, that he was estopped from maintaining an action.—NEWHALL v. HATCH, Cal., 64 Pac. Rep. 250.

56. MORTGAGES—Foreclosure—Lis Pendens.—Where plaintiff's husband executed a mortgage in which she did not join, she cannot set up a homestead in the premises after order of judgment for the mortgagee in foreclosure proceedings, to which she was not a party, but in which a *lis pendens* had been filed, and claim priority for it over the judgment permitting her to restrain a foreclosure sale.—MCNAMARA v. OAKLAND BUILDING & LOAN ASSN., Cal., 64 Pac. Rep. 277.

57. MORTGAGES—Foreclosure—Purchase by Agent of Mortgagee.—W, an agent of a mortgagee, agreed with the mortgagor to bid the amount of the mortgage debt at the foreclosure sale, and that in case there were no other bids, and W obtaining the property at that figure, he would give plaintiff ten days to redeem. The sale was honestly conducted, and bid off by W for the mortgage debt, and plaintiff failed to redeem. Held, that the sale was not invalid as violating the rule prohibiting mortgagees to purchase at their own sale, either directly or by an agent, since the mortgagor agreed that the agent might bid on the property, and the extension of time to redeem was sufficient consideration to support the agreement.—SHERROD v. VASS, N. Car., 38 S. E. Rep. 133.

58. MORTGAGE—Former Adjudication—Ejectment.—Where, in an action to quiet title to land in the United States circuit court, a decree is entered adjudging a certain deed to be a mortgage, such decree is conclusive as to the character of the conveyance in an action in ejectment thereafter brought in a State court between the grantees of the parties to the first suit.—SCHUMANN v. SPRAGUE, Ill., 59 N. E. Rep. 945.

59. MORTGAGE—Trust Deeds—Interest Notes.—Where a trust deed given to secure a principal note and seven interest coupon notes contained no provision giving the holder of such notes the right to foreclose on non-payment of interest when due, a holder of one of such coupon notes past due could nevertheless foreclose, saving the lien of the principal remaining interest notes.—SILVERMAN v. MCCORMICK, Ill., 59 N. E. Rep. 949.

60. MUNICIPAL CORPORATIONS—Defective Sidewalk—Joint Action Against the Municipality and Property Owner.—One injured by a defective sidewalk cannot sue the municipality and the property owner in the same action, they not being joint tort-feasors, though both may be liable,—the owner for breach of his primary duty, and the municipality for breach of its secondary duty.—DUTTON v. BOROUGH OF LANSDOWNE, Pa., 48 Atl. Rep. 494.

61. MUNICIPAL CORPORATIONS—Defective Streets.—Where the duty to keep the sidewalks of streets in safe condition rests upon a municipal corporation, and this obligation is not met, is long neglected, and injuries resulting directly from the unsafe condition of the walk occur to a pedestrian, himself exercising ordinary care and caution, the corporation is answerable in damages.—AUCOIN v. CITY OF NEW ORLEANS, La., 29 South. Rep. 502.

62. NEGLIGENCE — Defective Freight Elevator — Presumption of Negligence.—Where a passenger on an elevator, operated in a rented building by the landlord, is injured by the falling of the elevator through a defect in the appliance, the presumption of negligence arises against the landlord in accordance with the principle that negligence in a common-carrier of passengers is presumed from an injury to a passenger from a defective appliance, and hence a peremptory instruction for the defendant landlord is properly refused, though there is no proof of specific negligence.—SPRINGER v. FORD, Ill., 59 N. E. Rep. 953.

63. NEGLIGENCE—Electric Wires — Injury to Pedestrian.—One of the defendants maintained in a public street a line of wires carrying a harmless current of electricity, and the other defendant maintained in the street, below that line, a transverse line of wires, carrying a dangerous current. There were no guards to prevent one of the upper wires, that fell, from coming in contact with the lower wires, and thus conducting their dangerous current down to the surface of the street. Held, that the absence of such guards would sustain a finding that both defendants had neglected their duty to travelers on the highway.—ROWE v. NEW YORK & N. J. TEL. CO., N. J., 48 Atl. Rep. 523.

64. NEGLIGENCE—Pleading—General Denial.—Where, in an action for injuries to a passenger caused by the unsafe condition of the place furnished him to alight, the only defense set up was a general denial, it was error to charge that, in the absence of any plea of contributory negligence, the jury could not consider whether plaintiff's negligence was the sole cause of his injury.—KENNEDY v. SOUTHERN RY. CO., S. Car., 38 S. E. Rep. 169.

65. NEGLIGENCE—Railroad Company — Sparks from Engine—Destruction of Building.—A charge that if plaintiff stored hay in his barn, which was 50 feet from defendant's track, with knowledge that combustible material had been allowed to accumulate on the right of way, plaintiff could not recover for a destruction of the hay by a fire originating from a spark from an engine, was erroneous.—RUTHERFORD v. TEXAS & P. RY. CO., Tex., 61 S. W. Rep. 422.

66. PRINCIPAL AND AGENT—Authority of Agent.—Where an agent was employed to negotiate a mortgage loan for his principals upon their property, by a writing which also authorized him to bind them to pay for making "complete searches" of the title to premises proposed to be mortgaged, it was held that an agreement by him, assuming to act as their attorney with the loaning company, that he would arrange for giving it "clear title insurance, with the mortgage security," was *ultra vires* of such written authority.—GILTINAN v. LEHMAN, N. J., 48 Atl. Rep. 540.

67. PROCESS—Service.—Where an ordinance provides that a non-resident defendant shall be brought into court by a warrant and a resident defendant by a summons, a resident defendant brought in by a warrant, going to trial without making objection to the process, waives the irregularity.—STATE v. STEPHANY, N. J., 48 Atl. Rep. 578.

68. RECEIVERS—Appointment—Discretion of Court.—In an ancillary suit, the purpose of which is to collect through a receiver the assets of an insolvent corporation in a district other than that in which the main suit to wind up the affairs of the corporation is pending, where the court has appointed as receiver the same person appointed in the original suit, and has determined, in the exercise of its discretion, that the convenience of the parties interested requires the appointment of a resident co-receiver, its action in making such appointment is not subject to review on appeal.—COLTRANE v. TEMPLETON, U. S. C. C. of App., Fourth Circuit, 106 Fed. Rep. 870.

69. RECEIVER—Railroads—Liabilities.—A receiver of a railway company which furnishes cars to another company under a traffic arrangement, whereby the latter company is to operate them, is not liable for damages resulting from such operation over the tracks of the latter company.—THOMPSON v. DOTTERER, La., 29 South. Rep. 488.

70. REPLEVIN — Fraud — Rescission of Contract.—Where defendant's assignor purchased goods from plaintiff, and in settlement of a balance due thereon executed a note, which plaintiff accepted in payment, and credited the account in the sum thereof, the latter cannot maintain replevin for such of the goods as remained unsold, on the ground that they were fraudulently obtained, while retaining the money and the note.—JOHN H. HIBBEN DRY GOODS CO. v. HICKS, Ind., 59 N. E. Rep. 988.

71. SPECIFIC PERFORMANCE—Sufficiency of Bill.—In a bill for specific performance the proofs must, as to the essentials of the contract, support the allegations of the bill.—BANKS v. WEAVER, N. J., 48 Atl. Rep. 515.

72. TAXATION — Classification of Property.—Peculiarity existing in the use of property constitutes a legitimate basis of classification for the purposes of taxation, as in the case of railroad property; but it must be taxed according to its true value in view of and for such uses.—STATE v. VOGT, N. J., 48 Atl. Rep. 580.

73. TAXATION—Exemptions—Corporation Property.—Under Const. 1869, art. 12, § 13, providing that the property of all private corporations for pecuniary gain shall be taxed to the same extent as that of individuals, a law exempting certain property belonging to a private corporation is invalid unless it also exempts the same class of property owned by individuals. — ADAMS v. TOMBIGBEE MILLS, Miss., 29 South. Rep. 470.

74. TAXATION — Interstate Commerce — Occupation Tax.—Defendant took orders to erect lightning rods, and the rods and equipments were shipped to him from another State, but he often completed work on contracts immediately after making them, and before he could have received the goods from the consignor. Under defendant's contract with the consignor he had a salary and shared in the profits, he paying all freights and expenses of the business. The liability

of the consignor was limited to the acts of the defendant in furnishing the goods on orders taken by him. Held, that defendant was either an independent dealer or a partner residing and doing business in the State, and was not engaged in interstate commerce, but was liable to the occupation tax.—CAMP V. STATE, Tex., 61 S. W. Rep. 401.

75. TAXATION—Railroads — Gross Receipts — Interstate Commerce.—The defendant railroad company was organized under a charter from the State of Maryland, and its line was operated partly in that State and partly in another. Held, that a tax by the State of Maryland on such proportion of the entire gross receipts of the road as the length of its line in Maryland bears to the whole length of its line was not invalid as an interference with interstate commerce.—CUMBERLAND & P. R. CO. V. STATE, Md., 48 Atl. Rep. 503.

76. TRESPASS—Cutting Trees —Punitive Damages.—Where trees valuable only for lumber or cord wood are cut down by a trespasser under circumstances involving no peculiar injury to the landowner, punitive damages are not recoverable, even though permission to cut was asked, and not granted. In such a case the true measure of damage is just compensation.—HOLLISTER V. RUDDY, N. J., 48 Atl. Rep. 520.

77. TROVER—Conversion—Demand.—Where plaintiff delivered psoperty to defendant with the understanding that he should have possession of it and use it as he did, and should return it to him if he did not elect to purchase it, or if, electing to purchase it, he did not pay for it, and he elected to purchase it, but failed to pay for it, and simply failed to return it, there is no conversion which will support trover, without demand for and refusal to deliver possession.—MOORE V. MONROE REFRIGERATOR CO., Ala., 29 South. Rep. 447.

78. TRUSTS—Discretionary Powers of Trustees.—A deed of trust directing the trustees after the grantor's death to convey the property to his children according to the law of descent, unless, in their judgment, the same should be sold and the proceeds distributed on the same principle, but imposing on them the duty of providing supplies necessary for his comfort and that of his minor children, for which they are to be allowed to charge cost prices against him, and which are to be charged against his estate, does not convey such discretionary powers as would cause a revocation on the death of one of the trustees, but in such event the surviving trustee takes the estate, with the duty annexed to it of supplying the grantor with necessaries.—HUGHES V. WILLIAMS, Va., 38 S. E. Rep. 138.

79. TRUSTS—Husband and Wife—Heirs.—The wife of defendant's decedent owned certain real estate, which it was agreed between them should be willed or deeded to her brothers. Some time before her death she made a will, which she subsequently had destroyed, and, after a private conversation with her husband, stated that it was all settled; that she had left it entirely with her husband, who had promised to do right with her brothers; and that she wanted them to have five or six hundred dollars each. The wife died, leaving her husband her sole heir. Held, not to create a trust in the land in favor of the wife's brothers.—MOORE V. RANSDAL, Ind., 59 N. E. Rep. 986.

80. TRUST — Spendthrift Trust — Attachment of Income.—Where a bequest is made in trust for testator's son, to pay the income to him, and the will provides, "All moneys herein bequeathed are to be paid to the legatees in person, and to no one else, and shall not be assignable or transferable, nor subject to nor liable in any way whatever for any debts or obligations of any of said legatees, heretofore or hereafter incurred or contracted or created," a strict spendthrift trust is created.—BOARD OF CHARITIES AND CORRECTIONS OF CITY OF PHILADELPHIA V. LOCKARD, Pa., 48 Atl. Rep. 496.

81. USURY — Evidence. — Parol evidence the true character of a contract is admissible on an issue of usury, though the contract is in writing, and appears fair on its face.—PEIGHTAL V. COTTON STATES BLDG. CO., Tex., 61 S. W. Rep. 428.

82. VENDOR AND PURCHASER — Lien for Purchase Money.—Action was brought by a vendor to enforce his lien for the unpaid purchase money. The wife of the defendant was not made a party. In pursuance of a judgment, the lands were sold and purchased by the plaintiff. Held, that the contention that by the sale to the plaintiff the wife's inchoate dower interest became vested cannot be sustained, since her inchoate interest was subject to the superior equity of the vendor.—SARVER V. CLARKSON, Ind., 59 N. E. Rep. 933.

83. VENDOR AND PURCHASER — Warranty. — In an action by a non-resident or insolvent vendor to enforce a lien for purchase money, the purchaser may rely upon a breach of the covenant of warranty in his deed, though there has been no eviction.—LITTLE V. BISHOP, Ky., 61 S. W. Rep. 464.

84. WILL — Advancement — Testator's Intention. — Where a will bequeathed all the residuary estate of the testatrix in equal shares to her children, but provided that amounts of money formerly loaned to two of them should be deducted, as advancements, from their distributive portions, an instrument, executed prior to the making of the will, releasing them from all liability to the testatrix for the loans in question, is not admissible to show the intention of the testatrix, since such prior release could not affect her right to make such disposition of her property as she saw fit.—IN RE TOMPKINS, Cal., 64 Pac. Rep. 268.

85. WITNESS—Competency.—In an action brought against an administrator to recover for services rendered to the intestate by the plaintiff as housekeeper and nurse, the plaintiff is not competent to testify to services rendered in the presence of the intestate.—DICKERSON V. PAYNE, N. J., 48 Atl. Rep. 528.

86. WILLS—Construction—Action in Equity.—Where a will created an intervening life estate, under which the life tenant was in possession, and a trust which was to continue for five years, or for such time as, in the discretion of the executors, would be deemed beneficial for the estate, and an ultimate trust and remainders, an heir at law can maintain an action in equity for a construction of the will.—KALISH V. KALISH, N. Y., 59 N. E. Rep. 917.

87. WILLS—Construction—Partial Intestacy.—A will providing that all the rents, interests, and profit of testator's estate shall be paid to his widow during life, and directing the interest so accrued to be equally divided among testator's children on the death of the wife, is sufficient to pass the *corpus* of his personal estate to his children on the death of the wife.—BALDWIN V. TUCKER, N. J., 48 Atl. Rep. 547.

88. WILLS—Election — Dower.—A testator, owning real and personal property, gave only one-half of the net annual rents of his real estate to his wife for life, and directed that the whole of his estate should be divided equally between his two children on her death. Held, that the provision for her was not intended to be in lieu of dower, and did not force her to elect, though the effect of allowing her claim for dower was to reduce the rents.—GARRETT V. VAUGHAN, S. Car., 38 S. E. Rep. 166.

89. WILLS—Property Devised—Realty.—The words, "All the rest and residue of my property, personal or mixed, wheresoever situate, which I now own, and any or all accumulations therefrom, I give, devise, and bequeath," etc., will be held to pass only personal and mixed property, and not the real estate of which the testatrix died seised.—MILLER V. WORRALL, N. J., 49 Atl. Rep. 586.

90. WILLS—Publication.—That a will is holographic does not obviate the necessity of the testator acknowledging the signature and declaring the instrument to be his will, as required by the statute of wills.—IN RE TURRELL'S WILL, N. Y., 59 N. E. Rep. 910.